

University of Pennsylvania Law Review

And American Law Register

FOUNDED 1852

Published Monthly, November to June, by the University of Pennsylvania Law School.
Copyright 1931, by the University of Pennsylvania.

VOL. 80

JANUARY, 1932

No. 3

THE UNITED STATES AND THE WORLD COURT THE AUSTRO-GERMAN CUSTOMS UNION CASE

WILLIAM CURTIS BOK †

History

On January 27, 1926, the Senate of the United States adopted a resolution, by a vote of 76 to 17, advising and consenting to the adherence by the United States to the protocol and Statute of the World Court, subject to five conditions or reservations. In September, 1926, a Conference of the members of the Court adopted a protocol whereby they accepted the first four of these reservations in a manner satisfactory to the United States. Their qualified acceptance of the fifth reservation, however, was unsatisfactory.

As the action of the Court members left the situation open for further discussion, a Committee of Jurists, including Mr. Elihu Root, which had been appointed by the Council of the League of Nations for the purpose of revising the Statute of the Court, was invited to draft a new reply to the United States. The Committee met in March, 1929, and drafted a protocol to supersede that of 1926. This is known as the "protocol of accession".¹ The Committee also drew up a report recommending certain changes in the Statute of the Court. This report was then embodied in a protocol which is known as the "protocol of revision".² Both protocols were unanimously approved by the Council of the League of Nations in June, 1929, and in September of that year were also approved by a Conference of Signatory States. The Assembly of the League then approved them and they were

† Chairman, Committee on Foreign Relations of the American Foundation; member of Pennsylvania and Virginia bars.

¹ Protocol of Adherence of the United States signed at Geneva December 14, 1929, LEAGUE OF NATIONS C.493.M.157.1929.V.

² Protocol of Revision of Statute of Permanent Court of International Justice signed at Geneva, July 14, 1909.

thereupon opened for signature. To date more than three-fifths of the signatories of the Court Statute have signed and ratified them.

On December 9, 1929, the signature of the United States was affixed to the protocol of accession, to the protocol of revision and to the original protocol of the Court's Statute of 1920.³ President Hoover transmitted these protocols to the Senate for its advice and consent. The Senate then referred them to its Committee on Foreign Relations which agreed to consider them immediately after the Senate convened in December, 1931.

It is apparent from the above facts that the United States has decided to become a member of the World Court. The merits of that question were settled in 1926. All that remained for the Senate to do thereafter was to determine whether or not the other members of the Court should accept in a satisfactory manner the special conditions which the Senate attached to our assumption of membership. These special conditions, or reservations, are:

1. That such adherence shall not be taken to involve any legal relation on the part of the United States to the League of Nations or the assumption of any obligations by the United States under the treaty of Versailles.
2. That the United States shall be permitted to participate through representatives designated for the purpose and upon an equality with the other states, members, respectively, of the Council and Assembly of the League of Nations, in any and all proceedings of either the Council or the Assembly for the election of judges or deputy judges of the Permanent Court of International Justice or for the filling of vacancies.
3. That the United States will pay a fair share of the expenses of the Court as determined and appropriated from time to time by the Congress of the United States.
4. That the United States may at any time withdraw its adherence to the said protocol and that the Statute for the Permanent Court of International Justice adjoined to the protocol shall not be amended without the consent of the United States.
5. That the court shall not render any advisory opinion except publicly after due notice to all States adhering to the Court and to all interested States and after public hearing or opportunity for hearing given to any State concerned; nor shall it, without the consent of the United States, entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest.⁴

When the replies of the Court members to these reservations were received in 1926, President Coolidge stated that they squarely met the first four reservations and the first half of the fifth, but that they did not squarely meet the second half of the fifth. The question now before the Senate is whether the new reply of 1929 does so.

The second half of the fifth reservation concerns only the Court's power to give advisory opinions when requested to do so by the Council or Assembly of the League of Nations. In various of the American states, notably

³ Protocol of Signature of the Statute of the Permanent Court of International Justice, Geneva, December 16, 1920.

⁴ 67 CONG. REC. 2494 (1926).

Massachusetts, the legislature is given the right to ask the state supreme court for an advisory opinion on proposed legislation, but the tradition of the Common Law is against deciding moot cases. In other legal systems, however, the advisory jurisdiction of courts is regarded as important and useful. This type of jurisdiction has its greatest justification in the field of international law, which is based largely upon the construction of treaties and where it is in the interest of peace that cases shall be moot and that rights shall be determined in advance of an actual violation which may result in an inflamed national feeling and possibly war. It is not, therefore, surprising that the League regards its right to ask the Court for advisory opinions as an important element in the pacific settlement of actual disputes and as a powerful means of avoiding threatened invasions of national prerogatives.

Let us now turn to the protocols of 1929 and inquire whether or not they destroy, impair or modify the provisions of the last part of the fifth reservation and the rights of the United States thereunder.

The Protocols of 1929

The protocol of accession contains, as Article 5, the provisions which have become known as "the Root formula". The whole protocol reads as follows:

The States signatories of the Protocol of Signature of the Statute of the Permanent Court of International Justice, dated December 16, 1920, and the United States of America, through the undersigned duly authorized representatives, have mutually agreed upon the following provisions regarding the adherence of the United States of America to the said protocol, subject to the five reservations formulated by the United States in the resolution adopted by the Senate on January 27, 1926.

Article 1—The States signatories of the said protocol accept the special conditions attached by the United States in the five reservations mentioned above to its adherence to the said protocol upon the terms and conditions set out in the following Articles.

Article 2—The United States shall be admitted to participate, through representatives designated for the purpose and upon an equality with the signatory States Members of the League of Nations represented in the Council or in the Assembly, in any and all proceedings of either the Council or the Assembly for the election of judges or deputy-judges of the Permanent Court of International Justice, provided for in the Statute of the Court. The vote of the United States shall be counted in determining the absolute majority of votes required by the Statute.

Article 3—No amendment of the Statute of the Court may be made without the consent of all the contracting States.

Article 4—The Court shall render advisory opinions in public session after notice and opportunity for hearing substantially as provided in the now existing Article 73 and 74 of the Rules of Court.

Article 5—With a view to insuring that the Court shall not, without the consent of the United States, entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest, the Secretary General of the League of Nations shall, through any channel designated for that purpose by the United States, in-

form the United States of any proposal before the Council or the Assembly of the League for obtaining an advisory opinion from the Court, and thereupon, if desired, an exchange of views as to whether an interest of the United States is affected shall proceed with all convenient speed between the Council or the Assembly of the League and the United States.

Whenever a request for an advisory opinion comes to the Court, the Registrar shall notify the United States thereof, among other States mentioned in the now existing Article 73 of the Rules of the Court, stating a reasonable time limit fixed by the President within which a written statement by the United States concerning the request will be received. If for any reason no sufficient opportunity for an exchange of views upon such a request should have been afforded and the United States advises the Court that the question upon which the opinion of the Court is asked is one that affects the interests of the United States, the proceedings shall be stayed for a period sufficient to enable such an exchange of views between the Council or the Assembly and the United States to take place.

With regard to requesting an advisory opinion of the Court in any case covered by the preceding paragraphs, there shall be attributed to an objection of the United States the same force and effect as attaches to a vote against asking for the opinion given by a Member of the League of Nations in the Council or in the Assembly.

If, after the exchange of views provided for in paragraphs 1 and 2 of this Article, it shall appear that no agreement can be reached and the United States is not prepared to forego its objection, the exercise of the powers of withdrawal provided for in Article 8 hereof will follow naturally without any imputation of unfriendliness or unwillingness to cooperate generally for peace and good will.

Article 6—Subject to the provisions of Article 8 below, the provisions of the present protocol shall have the same force and effect as the provisions of the Statute of the Court, and future signature of the Protocol of December 16, 1920, shall be deemed to be an acceptance of the provisions of the present protocol.

Article 7—The present protocol shall be ratified. Each State shall forward the instrument of ratification to the Secretary General of the League of Nations, who shall inform all the other signatory States. The instruments of ratification shall be deposited in the archives of the Secretariat of the League of Nations.

The present protocol shall come into force as soon as all States which have ratified the Protocol of December 16, 1920, and also the United States, have deposited their ratifications.

Article 8—The United States may at any time notify the Secretary General of the League of Nations that it withdraws its adherence to the Protocol of December 16, 1920. The Secretary General shall immediately communicate this notification to all the other States signatories of the protocol.

In such case the present protocol shall cease to be in force as from the receipt by the Secretary General of the notification by the United States.

On their part, each of the other contracting States may at any time notify the Secretary General of the League of Nations that it desires to withdraw its acceptance of the special conditions attached by the United States to its adherence to the Protocol of December 16, 1920. The Secretary General shall immediately give communication of this notification to each of the States signatories of the present protocol. The present protocol shall be considered as ceasing to be in force if and when, within one year from the date of receipt of the said notification, not less than two thirds of

the contracting States other than the United States shall have notified the Secretary General of the League of Nations that they desire to withdraw the above mentioned acceptance.⁵

The protocol of revision reads as follows:

1. The undersigned, duly authorized, agree on behalf of the Governments which they represent to make in the Statute of the Permanent Court of International Justice the amendments which are set out in the Annex to the present protocol and which form the subject of the resolution of the Assembly of the League of Nations of September 14th, 1929.

2. The present protocol, of which the French and English texts are both authentic, shall be presented for signature to all the signatories of the Protocol of December 16th, 1920, to which the Statute of the Permanent Court of International Justice is annexed, and to the United States of America.

3. The present protocol shall be ratified. The instruments of ratification shall be deposited, if possible, before September 1st, 1930, with the Secretary General of the League of Nations, who shall inform the Members of the League of Nations and the States mentioned in the Annex to the Covenant.

4. The present protocol shall enter into force on September 1st, 1930, provided that the Council of the League of Nations has satisfied itself that those members of the League of Nations and States mentioned in the Annex to the Covenant which have ratified the Protocol of December 16th, 1920, and whose ratification of the present protocol has not been received by that date, have no objection to the coming into force of the amendments to the Statute of the Court which are annexed to the present protocol.

5. After the entry into force of the present protocol, the new provisions shall form part of the Statute adopted in 1920 and the provisions of the original articles which have been made the subject of amendment shall be abrogated. It is understood that, until January 1st, 1931, the Court shall continue to perform its functions in accordance with the Statute of 1920.

6. After the entry into force of the present protocol, any acceptance of the Statute of the Court shall constitute an acceptance of the Statute as amended.

7. For the purposes of the present protocol, the United States of America shall be in the same position as a State which has ratified the Protocol of December 16th, 1920.⁶

This protocol contains a long annex setting forth the detailed changes in the Statute which need not be quoted. The pertinent changes appear hereafter.

Those amendments to the Court Statute which especially affect the position of the United States form a new chapter, entitled "Advisory Opinions". This chapter reads as follows:

Article 65—Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request, signed either by the President of the Assembly or the President of the Council of the League of Nations, or by the Secretary General of the League under instructions from the Assembly or the Council.

⁵ *Supra* note 1.

⁶ *Supra* note 2.

The request shall contain an exact statement of the question upon which an opinion is required, and shall be accompanied by all documents likely to throw light upon the question.

Article 66—

1. The Registrar shall forthwith give notice of the request for an advisory opinion to the Members of the League of Nations, through the Secretary General of the League, and to any States entitled to appear before the Court.

The Registrar shall also, by means of a special and direct communication, notify any member of the League or State admitted to appear before the Court or international organization considered by the Court (or should it not be sitting, by the President) as likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time-limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question.

Should any Member or State referred to in the first paragraph have failed to receive the communication specified above, such Member or State may express a desire to submit a written statement, or to be heard; and the Court will decide.

2. Members, States, and organizations having presented written or oral statements or both shall be admitted to comment on the statements made by other Members, States, or organizations in the form, to the extent and within the time-limits which the Court, or should it not be sitting, the President, shall decide in each particular case. Accordingly, the Registrar shall in due time communicate any such written statements to Members, States and organizations having submitted similar statements.

Article 67—The Court shall deliver its advisory opinions in open Court, notice having been given to the Secretary General of the League of Nations and to the representatives of Members of the League, of States and of international organizations immediately concerned.

Article 68—In the exercise of its advisory functions, the Court shall further be guided by the provisions of the Statute which apply in contentious cases to the extent to which it recognizes them to be applicable.⁷

Discussion

At the outset four general observations can be made on the fifth reservation. *First*, it is statutory in form. *Secondly*, it is jurisdictional in substance and lays an absolute prohibition on the Court. *Thirdly*, it refers only to the relations between the United States and the Court. *Fourthly*, it provides no method for its enforcement, as it does not say by whom, to whom or when the United States shall claim an interest.

The following general observations can be made on the protocol of accession. *First*, it is by its terms of equal dignity and effect with the Protocol of the Court's Statute of 1920. *Secondly*, Article 1 accepts the Senate's five reservations upon terms and conditions appearing in later articles. *Thirdly*, these terms and conditions are wholly procedural and provide the method by which those of the reservations whose own terms do not supply the method of operation are made workable. *Fourthly*, Article 5 refers to

⁷ *Ibid.*

the prohibition contained in the second part of the fifth reservation, and has for its expressed purpose the insurance of the prohibition. *Fifthly*, Article 5 refers only to the relations between the United States and the Council or the Assembly of the League of Nations.

The First Four Reservations. It is plain that the protocol of accession accepts these reservations without qualification. The first and third reservations are not specifically referred to, beyond their general acceptance. They provide, respectively, that adherence to the Court shall not involve the United States in any legal relation to the League of Nations or in any obligation under the Treaty of Versailles, and that the United States shall pay its share of the Court's expenses as determined by Congress. The second reservation, providing that the United States shall participate equally with members of the Council and Assembly in the election of judges of the Court, is repeated in terms by Article 2 of the protocol. The first part of the fourth reservation, in which the United States claims the right of withdrawal from the Court, is also repeated in terms by Article 8 of the protocol, which then provides for the right on the part of the other Court members to withdraw their acceptance of our reservations by action taken by at least two-thirds of them, acting together within one year. The second part of the fourth reservation, providing that the Court Statute shall not be amended without the consent of the United States, is repeated in terms by Article 3 of the protocol.

The First Part of the Fifth Reservation. In July, 1926, the Court amended its rules so as to provide for public rendition of advisory opinions after notice and opportunity for hearing. It has never given a secret advisory opinion. So long as the requirement for such publicity depended upon a rule of Court, however, it was subject to alteration by the Court. The substance of these rules was therefore written into Article 4 of the protocol of accession so as to give them statutory effect and make their alteration impossible save by the action of all the Court members.

Further precautions were then taken by drafting the protocol of revision which definitely adds to the Statute of the Court a new chapter devoted to advisory procedure. It is fundamental to bear clearly in mind that the Court has a two-fold function. First, it renders judgments in ordinary disputes or lawsuits which the parties submit to the Court. Secondly, it renders advisory opinions upon request of the Council or Assembly. The cases in which this is done may involve an ordinary dispute or a matter which is not a dispute but in regard to which the Council or Assembly desires a legal opinion. The words "contentious procedure" or "procedure in contentious cases" are hereafter used to denote the procedure applicable to the first category, namely, ordinary disputes or law-suits.

It was the intention of the Committee of Jurists and of the Conference of Signatories in 1929 to make the advisory procedure the same as the pro-

cedure in ordinary disputes or law-suits. This clearly appears from the minutes of the meetings of those bodies. In the report of the Committee of Jurists there appears the following:⁸

"The present Statute contains no explicit reference to advisory opinions. The Court has been compelled by circumstances to remedy this omission to a certain extent in Articles 71, 72, 73 and 74 of the Rules of Court.

"The Committee considers that the essential parts of these provisions should be transferred to the Statute of the Court in order to give them a permanent character, which seems particularly desirable today in view of the special circumstances attending the possible accession of the United States to the Protocol of Signature of the Statute of the Court.

"The Committee therefore proposes to add at the end of the present Statute a new chapter numbered IV and headed 'Advisory Opinions', the first three Articles of which, numbered 65, 66 and 67, would reproduce the substance of Articles 72, 73 and 74 of the present Rules of Court.

"It also proposes that a final Article numbered 68 should be added to this chapter in order to take account of the fact that the Court may be called upon to give advisory opinions both in contentious and in non-contentious matters. The effect would be that, in the former case, the Court would apply the provisions relating to contentious procedure referred to in the previous chapters of the Statute, whereas those provisions would not always be applicable when the Court gave an opinion on a non-contentious matter. Thus, for example, Articles 57 and 58 should apply in all cases, but Article 31 would only apply when an advisory opinion was asked on a question relating to a dispute which had already arisen."

Articles 57 and 58 refer to the filing of dissenting opinions, signing the judgment and reading it in open court. Article 31 deals with questions which arise when the Court has or has not a judge of the same nationality as one or more of the parties to a case.

The following appears in the minutes of the meeting of the Conference of Signatories held on September 6, 1929:⁹

"The President asked whether there were any other proposals concerning Article 68.

"Sir Cecil Hurst (British Empire) said he was in the President's hands. The small amendment that he wanted to move to Article 68 was merely a new wording for the purpose of making the intention of that article more clear. The wording of Article 68 as he understood it, and as he thought everyone would agree, was intended to mean that, in addition to the specific provisions of Articles 65, 66 and 67, the Court, in dealing with advisory opinions, should be guided by this procedure so far as it was laid down in the Statute in contentious cases—that is, in cases where the parties submitted a dispute to the Court. He thought that that was without doubt the intention of the Committee of Jurists, and he should also have thought that it was fairly clear from the text; but he had had occasion to discuss at great length the whole of the question a few days previously with an enthusiastic gentleman from across the Atlantic, who had explained to him at

⁸ MINUTES OF COMMITTEE OF JURISTS, LEAGUE OF NATIONS C.166.M.66.1929.V, p. 125.

⁹ MINUTES OF CONFERENCE OF SIGNATORY STATES, LEAGUE OF NATIONS C.514.M.173.1929.V, pp. 46 and 47.

length the anxieties which were felt in America with regard to the whole question of advisory opinions and the hope that was entertained there that the procedure relating to advisory opinions would be assimilated, as much as possible, to the procedure in contentious cases. Sir Cecil Hurst had replied 'That is exactly what we have provided in the Statute,' and had read to him this Article, and he had said: 'We do not understand it.' So Sir Cecil Hurst had said: 'Very well, I am quite prepared to ask that the Conference should make the text a little more clear', and it was for that reason that he would suggest that it should read—he was reading the second sentence of Article 68:

'It shall further be guided by the provisions of this Statute prescribing the procedure to be followed in contentious cases to the extent to which it recognizes them to be applicable.'

"That he believed to be exactly what was intended. He believed it also to be the only correct interpretation of those words; and, therefore, if the sentence could be made a little plainer, and if by so doing the Conference could do no good, he suggested it would be wise to make this small change. . . .

"M. Fromageot (France) wished to second Sir Cecil Hurst's proposal. He had also had a conversation with the person mentioned by Sir Cecil Hurst. He thought that, if the Conference adopted the text proposed, it would reassure its friends across the Atlantic."

On the following day of the session, M. Fromageot further explained the situation, as follows:¹⁰

"When the Court or anyone else was asked for an advisory opinion, it was essential, if this opinion was to have any value, for the person consulted to have all the relevant documents and information at his disposal.

"In contentious cases, when a decision had to be pronounced, the procedure naturally had to provide for both parties to be heard; both parties stated their case, and the judges therefore had all the arguments before them. The same ought to be the case in advisory opinions.

"When an advisory opinion was asked for, the latter could have no value unless the person consulted could know all the relevant facts of the case in the same way as in contentious cases; he should know the arguments of both parties and both parties should adduce their evidence. It would be quite useless to give an advisory opinion after hearing only one side. For the opinion to be useful, both parties must be heard.

"It was therefore quite natural to lay down in the Statute of the Court that, in regard to advisory opinions, the Court should proceed in all respects in the same way as in contentious cases.

"He ventured to make this observation because he thought it was likely to allay certain apprehensions. . . .

"M. Politis (Greece) said . . . it would further be understood and recorded in the Minutes that this Article 68 should definitely be taken in the sense just indicated by M. Fromageot.

"The President said that, no one having any objection to M. Fromageot's observation, and the latter having been entered in the Minutes, it would naturally be taken into account.

"M. Goppert (Germany) suggested that M. Fromageot's statement should not only be recorded in the Minutes but should be reproduced in the report to be submitted to the Assembly."

¹⁰ *Ibid.* pp. 48 and 49.

In the report from the Conference to the Assembly of the League, the substance of M. Fromageot's remarks was incorporated as follows:¹¹

"The Conference associated itself with the following observations formulated in the course of its discussion with reference to the new Article 68:

"In contentious cases, where a decision has to be given, the procedure naturally involves hearing both parties; the two parties set out their arguments and observations, and the judges are thus provided with all the material necessary for reaching a conclusion. It must be the same in the case of advisory opinions.

"When an advisory opinion is asked, it is really indispensable, if the opinion is to carry any weight, if it is to be truly useful, that, in the same manner as in a contentious case, all the material necessary for reaching a conclusion should be placed before the person consulted; he requires to know the arguments of both parties.

"This is the reason for providing that the procedure with regard to advisory opinions shall be the same as in contentious cases."

There can hardly be a doubt of what the two bodies above quoted had in mind when writing Article 68. Yet doubt has been expressed by various persons in this country as to whether the expression of their intention is clear. The argument which flows from this doubt is that, under Article 68 as written, the Court has discretion to apply or not to apply the rules in ordinary disputes or law-suits to its advisory opinion procedure; furthermore, that one of those rules—Article 36—requires the consent of the parties, and therefore the Court can decide that the rule is not applicable and hence that consent is unnecessary, and the prohibition of the fifth reservation nullified. The proponents of this argument further point to the decision of the Court in the *Eastern Carelia* case¹²—where the court, by a mere majority, refused to render an advisory opinion in a case involving a matter in dispute between Finland and Russia when Russia refused to consent to the Court's jurisdiction—and contend that with a changing personnel the Court might in future overrule its decision and hold itself competent to render an advisory opinion without the consent of an interested party.

There is a common-sense answer and a legal answer to this argument.

The common-sense answer is that the argument is unreasonable and the contingency so remote as to be negligible. The clear intention of the authors of Article 68 was that in rendering an advisory opinion in a dispute the Court must apply all of the articles of its Statute which are relevant. There are some which are not relevant, and the Court naturally need not apply them. The intention was certainly not that the Court may arbitrarily choose only those articles which it pleases to deem relevant. The language of Article 68 does not really involve any discretion at all; the Court's decision as to the applicability of the Articles is a legal question and part of the Court's judicial function. This means that it must decide whether the situation of fact in

¹¹ *Ibid.* p. 79.

¹² PERMANENT COURT OF INTERNATIONAL JUSTICE, Series B No. 5.

the advisory procedure does or does not correspond to the situation of fact which the provision relating to the contentious procedure is intended to cover. For example, under Article 31 of the Statute "contesting parties" may select judges of their own nationality to sit with the Court on the case if the Court does not already have a judge of such nationality. The question which the Court must decide under Article 68 as to the applicability of Article 31 is whether or not there are contesting parties in the matter referred to it for an advisory opinion. If there are, Article 31 is applicable, and the Court has no discretion not to invite the parties to appoint national judges. If there are not, the Court has no discretion to invite merely interested governments to do so. It would not be practicable, under the many possible variations of circumstances, for Article 68 to enumerate what other Articles might or might not be applicable; general language is necessary.

While it is true that a court may interpret such provisions of its rules or constitution as are ambiguous, it may not disregard the clear mandates of its constitution, particularly in regard to such fundamental matters of its jurisdiction and competence as the necessity for the consent of the parties. To do so would work an amendment of its constitution and set at naught the expression of its creators. The clarity of the provisions of the protocol of accession requiring consent will be discussed later.

It is further unlikely that the Court members, after making specific rules for advisory opinion procedure in Articles 65, 66 and 67, analogous to some of those already provided for in contentious cases, would permit the Court, in Article 68, to set at naught the latter rules but not the former. Article 68 does not give the Court discretion to apply Articles 65, 66 and 67 "so far as it recognizes them to be applicable", because they expressly *are* applicable. For the Court to be free to declare all of the Statute inapplicable except Articles 65, 66 and 67 would result in absurdities limited only by one's imagination. The substance of this argument was made during the meetings of the Committee of Signatories. A drafting committee prepared Article 68 in the following form:¹³

"In the exercise of its advisory functions, the Court shall apply Articles 65, 66 and 67. It shall further be guided by the provisions of the Statute prescribed to be followed in contentious cases to the extent to which it recognizes them to be applicable."

The President then reminded the Conference that the Committee of Jurists had drafted the beginning of this Article with the express object of pointing out that there were articles of the Statute which had to be observed, but that there was something further to be done, and that it thus wished to place greater emphasis on the second sentence.

The minutes then disclose that

¹³ *Supra* note 9, at 48.

"M. Politis (Greece) quite understood this point, but he thought it was expressed by the second part of Article 68. It was rather naive to say that, in the exercise of its advisory functions, the Court should apply such and such articles. For example, Article 67, which, according to Article 68, had to be applied in connection with advisory opinions, read as follows:

'The Court shall deliver its advisory opinion in open Court. . . .'

"What did the reference in Article 68 add to this? The President agreed that it added nothing. M. Politis thought that in that case it was unnecessary to say it. When a useless clause was inserted in a text, those who interpreted it always wanted to find some meaning for it."¹⁴

The final wording of Article 68 was thereupon adopted.

The legal answer to the argument is that the fifth reservation and the protocol of accession definitely establish in statutory form the necessity for the Court to have the consent of the *United States* before it can entertain a request for an advisory opinion in any case. The protocol of revision extends to *all parties* to a dispute the protection of requiring their consent before an advisory opinion may be given. It does this by Article 68, making the advisory procedure the same as the procedure in ordinary disputes or law-suits. This is a confirmation of the principle of the *Eastern Carelia* case, where the Court, *inter alia*, said¹⁵ that it is

"well established in international law that no state can, without its consent, be compelled to submit its disputes with other states either to mediation or to arbitration, or to any other kind of pacific settlement. . . . The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activities as a Court."

It is clear from this that where a nation is a party to a dispute its consent is required, but it is arguable whether its consent would be required in a case to which it was not a party but in which it claimed to have an interest. In such a situation the nation in question would receive notice from the Registrar of the Court that an advisory opinion had been requested, and would be in a position to prove its interest. The provision on this point is contained in Article 73 of the present Rules of the Court and now incorporated as Article 66 of the Revised Statute:

Article 66. 1. The Registrar shall forthwith give notice of the request for an advisory opinion to the Members of the League of Nations, through the Secretary General of the League and to any States entitled to appear before the Court.

The Registrar shall also, by means of a special and direct communication, notify any Member of the League or State admitted to appear before the Court or international organization considered by the Court (or, should it not be sitting, by the President) as likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time-limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question.

¹⁴ *Ibid.*

¹⁵ *Supra* note 12.

Should any Member or State referred to in the first paragraph have failed to receive the communication specified above, such Member or State may express a desire to submit a written statement, or to be heard; and the Court will decide.¹⁶

If the Court should uphold the claim of interest, the nation presenting it would become a party and its consent would thereby become necessary.

While the Court, preliminary to considering a case on the merits, would undoubtedly grant any such request that was reasonable, particularly when the interest claimed was open and notorious, it does not seem that the Statute standing alone and containing the principle of the *Eastern Carelia* case meets the prohibition of the fifth reservation with the technical completeness and clarity desired by the Senate; *first*, because the Court and not ourselves would decide the merits of our claim, and *secondly*, because we might claim an interest that was not open and notorious but based merely upon an assertion of public policy or political expediency. The fifth reservation enables us effectively to make all such claims to the Court and give no reasons.

The fifth reservation and the protocol of accession which accepts it stand beside the Statute, are of equal force with it, and definitely clear up the matter, since they cover all cases in which the United States might claim an interest, of whatever nature or degree. They impose a separate and independent prohibition upon the Court, however clear or vague the provisions of the Statute may be. This prohibition cannot be jeopardized by whatever applicability of the rules for contentious cases the Court may recognize in its advisory functions. Regardless of the nature or degree of our interest, the Court cannot avoid the prohibition imposed by the United States, so long as the United States remains a member. Upon its ceasing to be a member it would enjoy the rights set forth under the Statute, including the right to claim and prove an interest not apparent to others.

Another objection has been raised to Article 68, namely, that it refers only to matters of procedure and would therefore not render the consent of the parties a condition precedent to giving an advisory opinion. At the meeting of the Conference of Signatories held on September 6, 1929, Sir Cecil Hurst offered an amendment to Article 68 which, if adopted, would have limited its scope to procedure. It read:¹⁷

"It (the Court) shall further be guided by the provisions of this Statute prescribing the procedure to be followed in contentious cases to the extent to which it recognized them to be applicable."

Objection was made by M. Raestad, of Norway, on the ground that the word "procedure" did not cover all that was indicated in the previous articles. Article 36 of the Court Statute, for example, relates to the consent of the

¹⁶ *Supra* note 2.

¹⁷ *Supra* note 9, at 47.

parties and is hence jurisdictional and not procedural only. Sir Cecil's amendment was thereupon abandoned.

Let us now examine the prohibition of the fifth reservation and the terms of its acceptance in the protocol of accession and determine whether the veto power claimed by the United States remains absolute.

The Second Part of the Fifth Reservation. There can be no doubt that the written terms of the prohibition are real and absolute. There may be doubt as to how the prohibition can be made effective, and doubt as to the ultimate implications of the prohibition, but no doubt of the prohibition itself. Our mere claim of interest and refusal to consent, made to the Court, are enough to bar its jurisdiction.

When the Committee of Jurists attacked the problem in 1929 of drafting a new reply to the United States, they had the alternatives of dealing with it in a theoretical or in a practical way. The first alternative was soon discarded, as it involved an interpretation of what is meant by the word "interest". There are obviously so many kinds of interest—legal, political, sentimental and economic—that a definition or even an enumeration of them could not reasonably include every possible set of circumstances. It was therefore deemed wiser to bring the discussion down to a practical plane and provide a system whereby concrete cases might be readily discussed as they arose. In its report on its work, the Committee said that since the United States feared lest its rights be not protected, and the signatories feared lest their freedom in dealing with international problems be embarrassed,¹⁸

"Mature reflection convinced the Committee that it was useless to attempt to allay the apprehensions of either side, which have been referred to above, by the elaboration of any system of paper guaranties or abstract formulæ. The more hopeful system is to deal with the problem in a concrete form, to provide some method by which questions as they arise may be examined and views exchanged and a conclusion thereby reached after each side has made itself acquainted with the difficulties and responsibilities which beset the other."

The second part of the fifth reservation is purely statutory in character and imposes its prohibition upon the Court and upon the Court alone. No prohibition whatever is imposed upon anyone's *requesting* an advisory opinion or upon the *method* of requesting it. As many requests might be made by the Council or Assembly as are conceivable; but the Court may not entertain them, when made, without the consent of the United States.

This prohibition is accepted by Article 1 of the protocol of accession as follows:

"Article 1. The said signatories of the said protocol accept the special conditions attached by the United States in the five reservations mentioned above to its adherence to the said protocol, upon the terms and conditions set out in the following articles."

¹⁸ *Supra* note 8, at 108.

None of the following articles but Article 5 (the Root formula) makes any mention of the prohibition. That article does so in this language:

"Article 5. With a view to insuring that the Court shall not, without the consent of the United States, entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest", *etc.*

Then follow provisions which are thus expressly declared to be for the purpose of insuring that the prohibition shall be the prohibition it purports to be. They provide a procedure to be followed in making known the interest of the United States; in enabling the Council or the Assembly of the League of Nations to learn whether the United States claims an interest before the request is made; and in enabling the United States to decide whether it has and shall claim an interest, and whether it shall consent. They provide a procedure out of court, prior to the time when the United States may impose its right of prohibition, and in no way affecting that right. They are procedural and not jurisdictional. If the Root formula can be said to attach any condition to the acceptance of our reservations by Article 1, it is only that all parties must first discuss the matter of the United States' interest before it may exercise its final right of veto before the Court, in order that the request for an advisory opinion may be sent to the Court intelligently and after all aspects of the matter have been considered.

It was certainly necessary for some one to provide a procedure for the United States to make known its claim of interest. Had the fifth reservation been accepted without one, the Council would have to deliberate the necessity of requesting the opinion, possibly for a long time, without any means of knowing whether the United States considered itself to be interested in the matter. Similarly the United States would be ignorant that a request was contemplated until notified by the Registrar of the Court that it had been received and was pending. For us to begin our consideration of the matter afresh at that point might result in postponing the case and confusing, or even frustrating, the settlement of a problem whose prompt solution was of importance to the nations concerned or to the peace of the world. The United States, which has always led the way to a peaceful settlement of international disputes, would surely not wish to be in a position capable of creating such embarrassment.

The Root formula enables us to avoid taking this position. By virtue of its provisions we would exchange views with the Council or Assembly at the beginning. We would discover from the outset their interests and reasons for wanting an advisory opinion; they would discover our interests and reasons to the contrary, should they exist. Possibly the request would not be made in consequence; possibly our interest would appear to be unfounded. Without the Root formula we should have to hold up every request until we

could discover whether we had or should claim an interest. Under the formula all parties will have the information necessary to reach an intelligent decision, either to refrain from making a request which the Court would later be prohibited from entertaining, or to make the request in such a way as would be compatible with the interests of all concerned. We are thus enabled to do at the beginning what otherwise we could do only at a later and more mature stage of the proceedings with probable waste of time and embarrassment to other nations. It must also be remembered that there may well be situations wherein the mere request for an advisory opinion, with the attendant publicity, would be as embarrassing to us as though the Court actually rendered the opinion requested. The procedure of the formula enables each party to the negotiation to reach its conclusions with full knowledge of the position of the other. That is the practice of open, frank and sincere diplomacy, which is the order of things today. That is the practice of a decent consideration of the rights of other nations and of our own.

Some doubt, however, has been expressed that the Root formula fully meets the prohibition of the fifth reservation, in view of the third and fourth paragraphs of Article 5 of the protocol of accession, which read:

"With regard to requesting an advisory opinion of the Court in any case covered by the preceding paragraphs, there shall be attributed to an objection of the United States the same force and effect as attaches to a vote against asking for the opinion given by a Member of the League of Nations in the Council or in the Assembly.

"If, after the exchange of views provided for in paragraphs 1 and 2 of this Article, it shall appear that no agreement can be reached and the United States is not prepared to forego its objection, the exercise of the powers of withdrawal provided for in Article 8 hereof will follow naturally, without imputation of unfriendliness or unwillingness to cooperate generally for peace and goodwill."

Why, it is asked, is the objection of the United States given the same force and effect as that of any other nation when it is intended to give the United States an absolute veto; and why provide a right to withdraw when all the United States need do to prevent an advisory opinion is to refuse its consent? The argument that is drawn from these questions is that the right of absolute veto was not intended at all, and that the utmost the United States can do is not to prevent the opinion from being given but simply to withdraw after its efforts of persuasion have failed and so restore the *status quo ante*.

The complete answer to this argument should appear from a reading of the text and from the history of the United States *vis-a-vis* the Court. That Article 5 is procedural and not jurisdictional is clear from the fact that it deals only with what happens *before* the request for an opinion ever gets to Court, while the fifth reservation deals only with what the United States may do *after* the request has reached the Court. The two are distinct as to time

and place. It must be noted that the third paragraph of Article 5 begins with these words, "With regard to *requesting* an advisory opinion", *etc.* This language clearly indicates the purpose of the provisions which ensue in this paragraph. It follows that the objection of the United States is given the same force and effect as the negative vote of a member nation, *so far as the procedure of requesting an advisory opinion is concerned*; it does not follow that such force and effect is given to its veto power under the fifth reservation. The fifth reservation does not prevent anybody from requesting an advisory opinion or any number of advisory opinions, and it is completely indifferent to the manner in which such request is made. But the Court cannot entertain it until it is made, and not then, without our consent.

Furthermore, it must be remembered that it is the Court members who are speaking in the protocol of accession; it is their reply to the communication sent to them in 1926 by the United States and containing its reservations. This protocol takes the place of their unsatisfactory reply in 1926, wherein they assumed that the United States based its demand for an absolute prohibition upon the belief that a unanimous vote was required in order for the Council or Assembly of the League to request an advisory opinion. This belief was wrong, in the opinion of the signatories, for it had never been decided whether a unanimous or majority vote was required and they were unwilling to decide it in advance of the question's being raised in a specific case. They therefore replied that the United States would of course have absolute veto power in any case wherein it was a party, since the consent of the parties was necessary in any case; but in a case wherein the United States was not a party but claimed an interest, they could guarantee to the United States only that its objection would have the same force and effect as that of any other nation, and that the Court should declare what this effect was. The Court members recognized that the United States does not want to hamper the Council or the Assembly in its work, since it is not a member of the League, or force the League to run its affairs in a manner which it is unwilling to do. On the other hand, it is the Council and the Assembly which alone can request an advisory opinion of the Court, and the United States should be able to work with them harmoniously. How could it be worked out so that the rights of the United States could be protected and the procedure of the League not interfered with unduly? The answer was that the United States should accommodate itself to the procedure of the League to the extent that the United States might see fit to make contact with it, and up to the point where its right of veto attaches. So long as the United States had the power of ultimate veto, it could not be harmed by adopting their methods.

Were the United States to insist that its objection in the Council or Assembly at that moment be an absolute bar to the request's being made,

regardless of whether or not a unanimous or majority vote were required, it might seriously hamper the work of the League, which has definite duties and functions to perform in the interest of peace. In certain cases it must provide a solution or the formula of a solution for a dispute which might result in war if it were not given. If such solution included an advisory opinion, the League should be able to show that at least it has done all it could do by asking for one; if the Court then decides it cannot give one, the League is absolved from blame. For reasons of this sort the Court members felt that the League should be left free in the matter of its own procedure so long as we see fit not to become a member.

The foregoing considerations, viewed in the light of the Senate debates, led the signatories in 1926 to include in their protocol something which would safeguard their procedure. They contemplated that the United States would use the Council or Assembly as the forum where its ultimate objection would be so made and crystallized that all that would remain would be for the Court to pass upon the validity of our claim of interest as a matter of law. They accordingly stipulated that in requesting an advisory opinion our objection should be given by the Court the same force and effect as the negative vote of any other member, thus leaving it to the Court to decide legally what they were unwilling to decide diplomatically, namely, whether an advisory opinion could be requested by a majority vote or whether unanimity was essential. This did not give us a veto power and was therefore unsatisfactory.

In 1929, however, Mr. Root's draft protocol presented a different theory, based upon the fifth reservation as requiring a veto power. It then became apparent that we were unwilling to allow the Court to evaluate the force of our objection at all, but on the contrary that the Court, without our consent, could not only not render an opinion but could not even entertain a request for one: it could take no evidence and hear no arguments. This made it clear that we would not object to what the Council or Assembly might do, but that we would object to what the Court might do. But to stand upon this ground alone made possible the embarrassments and delays previously mentioned. Some method of intercourse was needed by which, before a request was sent to the Court, a preliminary discussion could be had which would reveal whether we had an interest and whether the matter might be dropped or so modified as to be acceptable to us or the situation clarified in other ways. The Council or Assembly was the obvious party to deal with. Such a discussion might not, however, result in an agreement of views upon the nature or scope of our interest, and the signatories were anxious that our acknowledged veto power to the Court should not creep into the League bodies and hamper them. They were willing to discuss matters with us, but they wanted to be free, so long as the unanimity rule remained undecided by legal as against diplomatic action, to make a request of the Court and allow us later to prevent the Court's entertaining it if we chose to do so. This

would leave the League's procedure unimpaired and yet give us the substantive right we insisted upon having. In short, a different situation was contemplated in 1929 than in 1926. So, to guarantee the safety of their procedure and make assurance doubly sure, the signatories inserted the same kind of specific provision in the 1929 protocol as they had before, but with the significant omission of the Court's power to evaluate the force of our objection. Hence paragraph 3 of Article 5 limits such evaluation to the procedure of the League bodies and to the extent to which the United States may be considered to make contact with it.

Many enemies of the Court assert that this contact involves us in the mechanics of the League. Such position is entirely unwarranted: we do not participate in the discussions of the League bodies, nor do we vote or even interpose an objection there. We simply make known our position and give notice as to whether or not we shall object to the Court later. The signatories have protected themselves by Article 5 to the extent that this may be considered a contact with their procedure which might embarrass it. That is all.

It is of the utmost importance to observe in this connection that Article 5 does not give the United States the right to vote on the question of requesting an advisory opinion. Note the language used in the third paragraph, ". . . there shall be attributed to an *objection* of the United States the same force and effect as attaches to a *vote* against asking for the opinion given by a Member. . . ." We are specifically not given a *vote*. This language is not fortuitous, because in Article 2 of the protocol we are given a vote in the matter of electing judges to the Court, at the same time that we are given a position of equality with League members in the same connection. The pertinent part of Article 2 reads, "The United States shall be admitted to participate . . . upon an equality with the signatory States Members of the League . . . for the election of judges . . . The *vote* of the United States shall be counted in determining the absolute majority of *votes* required by the Statute." Here all participants in an election, including ourselves, are given *votes*. Hence the use of the word "objection" in paragraph three of Article 5 must have been intentional, as "vote" could have been used as easily had that been actually intended.

The explanation seems clear. The purpose of Article 5 of the protocol is not to give us a vote: the purpose is, in the wording of that article, to determine "whether an interest of the United States is affected": that is, whether the fifth reservation applies. That is all. It is accomplished by discussion, not by voting. This discussion or exchange of views, as it is called, simply serves to put the Council or Assembly on notice that we have or have not an interest so that they can proceed intelligently. If we tell them we have no interest it would be absurd for us, a non-member of the League,

to have a "vote". Our part in the proceedings has a limited and specific purpose, namely, to make known our interest. If we do so, and are not agreed with, we assume a position which requires a name. Having made it clear in our first reservation and elsewhere that we will not involve ourselves in any relationship with the League, our position does not require us to be considered a member, even *ad hoc*, with a member's right to a "vote". Since the members wish to do something which we do not wish them to do, how better can our position be described than as that we have an "objection"? This "objection", referred to in the third paragraph of Article 5, is not one to be interposed at a meeting of the Council or the Assembly, as a lawyer would interpose an objection in court. It is rather the statement of our position, made clear by the exchange of views, that upon a particular question the United States has an objection to the exercise of the Court's jurisdiction which it will interpose to the Court in case that question ever reaches the Court in the form of a request for an advisory opinion. The Council will thereupon give to our known position an effect equivalent to the negative vote of a League member in determining whether to make a request to the Court which will ultimately have to meet with objection to the Court's jurisdiction over it unless the United States is willing to forego that objection.

It is also important to observe that the method of intercourse provided for is an "exchange of views", carried on through any channel designated by the United States. We do not "participate" in the discussions of the Council or the Assembly, as we "participate" in the election of judges. We make known our views to one or the other of the League bodies, not to individual members of those bodies. They discuss among themselves and make known their conclusions in the name of the Council or the Assembly. We do the same in the name of the United States. The views are not exchanged or communicated by any discussion in the League bodies. The proceeding is carried on in writing by a communication from one party to the other, and a reply, and an answer and reply, and so on, until a conclusion is reached or a definite disagreement results. We will not go before the Council or sit in the Council or present an objection to the Council or vote in the Council. We merely engage in a familiar diplomatic procedure which is quite sufficient to make clear our interest and our unwillingness to forego our objection to the Court.

At this point the provision as to the evaluation of our objection steps in to prevent the abrupt disbanding of the session when our final position has been made known. Instead of being hung up in the air, the Council or Assembly have the assurance that they may proceed to complete their records. They can ascribe to our position the same force and effect as the negative vote of a member and forward the request to the Court, signed by the majority. The League has then completed its part, and the rest remains outside its field, that is, between the Court and the United States. It would unques-

tionably require a matter of the gravest importance for the technical position to be followed so far, for in ordinary cases our expression of unwillingness to forego our objection to the Court would conclude the matter. That objection, our veto power to the Court, remains unaffected.

It must also be remembered in this connection that we never argue our claim of interest before the Court or even necessarily give our reasons there. That is done during the exchange of views with the Council or Assembly. The Court is therefore never in the position of passing upon the merits of our claim; the fact that it is made suffices to prevent the opinion.

It is therefore submitted that the third paragraph of Article 5, far from striking down the prohibition of the fifth reservation or entangling us in League procedure, is of no particular concern to us, but is, as Mr. Root has described it, "a gesture of good will" toward the signatories.

The first and second paragraphs of Article 5 further strengthen the above contention as to the nature of an "objection" by the United States. The first paragraph supplies the machinery for an exchange of views between the United States and the Council or Assembly if desired; the second paragraph provides that the Registrar of the Court must notify us of every request for an advisory opinion which the Court receives (as it must notify all nations admitted to appear before the Court, whether we adhere or not) and that proceedings shall be stayed until an exchange of views shall take place if for any reason it has not already done so and if we claim an interest. In other words, we may or may not have exchanged views with the Council or Assembly, prior to its making a request to the Court, for such reasons as oversight or the necessity for making a request to the Court without the time required for a prior exchange of views. Regardless of whether we have or have not, the Registrar of the Court must notify us when the request is received, and the Court must give us a reasonable time to comment upon it.

Thus the protocol of accession gives the United States the right to an exchange of views, *either before or after* a request for an advisory opinion has been made, according to circumstances. In the latter case we may not have acted at all in the matter of making the request. If, therefore, the argument is sound that our ultimate objection to the Court is not a veto but only the same thing that every other nation has, why does the very next paragraph of the protocol equalize our objection with that of other nations only "with regard to *requesting* an advisory opinion" in any case covered by the preceding paragraphs? As pointed out above, we may not have expressed any view whatever with regard to requesting one. If so, then the third paragraph cannot apply to us because the circumstances stated at the opening of the paragraph do not exist. There would be no need for these limiting words if our objection were intended to be equal with that of other nations in all circumstances.

Logic compels the answer that the provision for an equivalent objection was deliberately inserted to apply only when we actually exchange views with the Council or Assembly *prior* to their requesting an advisory opinion, in order to safeguard their procedure. The limiting words indicate that the League bodies would not consider their procedure jeopardized by an exchange of views held *after* the request was made. Their work would then have been completed, and the exchange of views would serve to reconcile any differences, with the result that the Council or the Assembly might or might not modify their request to the Court. Should this exchange of views result in our making an "objection", it could not possibly harm their completed procedure and there would be no point in giving it the value of another nation's negative vote. Having reached a stated impasse, we would cease to exchange views and interpose our objection to the Court's competence under the fifth reservation.

Those who argue that the United States cannot prevent the opinion from being given but may only restore the *status quo ante* by withdrawing, point to the Minutes of the Committee of Jurists for evidence that such was the jurists' intention.

The Chairman, M. Scialoja, said, contrary to the intention sought:¹⁹

"According to Mr. Root's proposals, whatever might be the nature of the dispute giving rise to a request for an advisory opinion, the United States reserved to itself the right to prevent any request being made for an opinion or to withdraw. The United States would thus have a right which was more extensive than that embodied in the draft of Sir Cecil Hurst, namely, the right to veto a request for an advisory opinion, whatever might be the size of the minority. If that interpretation were false, he would be delighted, as it would signify that the United States renounced its demand, at least in certain cases, but he did not think this was so."

M. Politis then said:²⁰

"Sir Cecil Hurst, in his proposal, achieved the same result, in fact, as if the United States were a Member of the Council. If unanimity were necessary, the veto of the United States would suffice to prevent the request for an opinion being made. If a majority sufficed, the negative vote of the United States would be inoperative."

The Chairman, in the course of debate, said further:²¹

"According to the proposal of Sir Cecil Hurst, the United States of America would have the right to veto a request made to the Court for an advisory opinion, if unanimity were necessary for such a request. The Chairman had made a similar proposal at the previous meeting but it had been rejected by the Committee because the members had felt that the possibility should be left open for the Council or the Assembly to submit a request for an advisory opinion which had not been adopted unanimously

¹⁹ *Supra* note 8, at p. 18.

²⁰ *Ibid.* p. 19.

²¹ *Ibid.* p. 20.

but only by a majority. In the latter case, however, the vote of the Government of the United States of America could not prevent the Assembly or the Council from making such a request. If the representative of the United States were satisfied with this solution, the Committee itself might rest content; but the Chairman did not think this was the case. To assimilate the position of the United States to that of a Member of the League of Nations in cases where a request for an opinion was adopted by a majority vote would not, he thought, satisfy the desires of that country, which really wished to be able in certain cases to veto recourse to the Court even when such recourse had been voted by the majority. This point, he thought, should be made clear."

Immediately following this statement by the Chairman, M. van Eysinga made the following remarks:²²

"There might be a section of public opinion in America which desired to claim the right of veto in cases where a request for an advisory opinion had not been unanimous. The Committee now learned that the United States would be content if it were allowed to withdraw in such circumstances. This being so, M. van Eysinga urged the adoption of the second paragraph of Sir Cecil Hurst's proposal."

As there was no dissent from this last statement, it is argued that the Conference did not intend the United States to have the option of standing by its objection and so rendering the Court incompetent to give the opinion requested until the other signatories should withdraw their acceptance of the reservations, or of withdrawing itself; but only to have the opportunity to dissuade the other signatories, failing which it could only withdraw without preventing the opinion. This does not follow. Mr. Root told the Senate Committee on Foreign Relations, January 21, 1931, that he believed in the Senate's reservations and accepted them as the basis of the negotiations. It is proper to assume that the other jurists did too. As a basic fact, it did not have to be discussed at length. The following extracts from the debates clearly show that the existence of a right of veto was recognized. M. Raestad said:²³

"If the proposal of Mr. Root were examined, the Committee would note that it showed progress on the situation which existed in 1926, in so far as the following three points were concerned:

"1. The United States formally abandoned all interest in the question whether unanimity or a mere majority was required when the Council or the Assembly requested an advisory opinion.

"2. The United States would explain its point of view when it claimed that a particular question was of interest to it.

"3. In case of disagreement, if the Council or the Assembly maintained its request for an advisory opinion, contrary to the wishes of the United States, the United States would not insist on exercising its *right of veto*²⁴ and would withdraw from the Permanent Court."

²² *Ibid.*

²³ *Ibid.* p. 17.

²⁴ Italics the present writer's.

M. Politis is reported thus:²⁵

"He could not imagine it possible that in a case where the United States of America had clearly shown that it had a real interest at stake and could not agree to recourse to the Court, the Council would disagree. Similarly, in the opposite case; if the Council were in the same position, it was impossible to believe that the United States would exercise its *right of veto*.²⁶ The Committee should not draw up provisions to meet purely theoretical cases. The whole basis of the relations between the League and the United States of America in regard to the Permanent Court must be mutual confidence. So strong was the feeling in the United States of America in favor of international justice that it was almost impertinent to suggest that the United States would ever prevent its operation."

The intention of M. Raestad and M. Politis seems clearly to be that while the United States has a veto power, it would never push matters so far as to insist upon exercising it. To do so would be to destroy that confidence and regard for justice without which it would be useless to have or continue any arrangement *vis-a-vis* the Court. To persist in our veto would force the signatories to withdraw their acceptance of our reservations, and then permit the Court to proceed with the opinion, by which time the United States would welcome them to it and be happy to be free of the whole business. It is almost inconceivable that matters could ever get to such a pass without war or a serious threat of war. The real question is, therefore, whether we would care to press our right of prohibition after it became clearly apparent that we could not agree with the leading signatories as to the proper scope of advisory opinions. With war or the threat of it as the alternative, it is certainly wise to have a provision for withdrawal on the express understanding that its exercise shall impute no unfriendliness or unwillingness to co-operate for peace. As Mr. Root has well said, "You cannot run a co-operation in the maintenance of an institution like a court on law-suits. This is an experiment in co-operation; it is an effort for the maintenance of a great institution: and if it cannot be done in a friendly manner and with the adjustment and agreement of views, we had better cease the effort."

Undoubtedly it was to this feeling, reflected by intelligent opinion in this country, that M. van Eysinga was referring. This is a far different thing from saying, however, that we have no veto power but only the power to withdraw: the veto remains, whether or not it may prove to be intelligent or decent to use it. As pointed out above, the discussion of what effect our objection shall have is concerned only with the procedure in the Council or Assembly relative to requesting an advisory opinion, for it would unfairly hinder the work and the record of those bodies if we were able to prevent their even making the request.

One other point should be made in this regard. In the protocol of 1926—now superseded by the protocol of accession—it was provided that

²⁵ *Supra* note 4, at p. 21.

²⁶ Italics the present writer's.

the *Court*, not the Council or Assembly, should give the objection of the United States the same force and effect as the negative vote of a member. The present protocol significantly alters that provision, for it constituted a real infringement on the prohibition of the fifth reservation; because it expressly allowed the Court to decide whether or not we had an absolute veto, that being the very thing the fifth reservation was designed to prevent. The fact that the present protocol of accession does not contain this provision gives weight to the inference that not only do we mean what we say in the fifth reservation but that the jurists and the signatories know very well what we mean and that we mean it. Of course, the Court may of its own motion refuse to give an advisory opinion in a case where it has been asked for only by a majority vote. We are now, however, protected by the fifth reservation against the Court's evaluating our objection or passing upon our claim of interest.

Now as to the right to withdraw. It must be observed at once that in 1926 the Senate wrote this right into the fourth reservation. It is therefore not odd to find it in the protocol of accession which accepts our reservations. If any one should care to know why the right to withdraw is included, the Senate should be consulted, not the signatories. There is certainly no objection to the signatories adding a reciprocal right to withdraw; it is an infinitely more burdensome right for them than for us, since their action does not become effective unless two-thirds of them signify their desire to withdraw within a year. They would not, by such action, withdraw from the Court, as we would do if we were to exercise our withdrawal power. They would simply withdraw their acceptance of our reservations and remain members of the Court. But our reservations could not be so nullified if any number less than two-thirds of all the members should take this action; single nations or any group of nations less than two-thirds in number may not effectively do this for their own purposes. In short, the matter would have to be so important that two-thirds of the nations of the world would want an advisory opinion despite our objection.

This mutual right to withdraw is not a novelty for the United States, which has had over four hundred treaties with such provisions in them.

Reference has already been made in this article to the fundamental reason for the withdrawal provision, namely, that if we were in hopeless disagreement with the other nations as to the existence of our interest and as to the proper scope for advisory opinions, mutual confidence would be destroyed and all parties might as well cease the effort to co-operate and agree to disagree.

The next thing to be observed is that the protocol of accession contains no *agreement* that any one shall withdraw at any time. The United States is free to withdraw from the Court or not, as it pleases: the signatories are free to withdraw their acceptance of our reservations or not, as they please.

But if they decide to exercise their power, two-thirds of them must act within a year. The fourth paragraph of Article 5 refers to "the exercise of the powers of withdrawal" and these powers are bi-lateral and not obligatory. Those who raise the objections above referred to seem to think that all we can do, if the Council requests an advisory opinion over our objection, is to withdraw. Such action would leave the Court free to do the very thing we had been trying to prevent. Our technical remedy, provided we wished to push matters so far, would be to send an objection to the Court; the Court could then do nothing, and the only recourse of the signatories would be to their cumbersome right to withdraw. *It is our adherence, not our withdrawal*, which prevents the request for an advisory opinion from being entertained.

If the signatories did withdraw, the *status quo ante* would not be restored unless we should thereafter also withdraw from the Court, for we would still be a member, but without the benefit of our reservations. The United States would then undoubtedly withdraw and become a non-member. Having done so, it would then be protected by the Statute, for when the amendments, including Article 68, are in force they would not be revoked by our withdrawal. Our consent would therefore be necessary in any contentious case to which we were a party and in any advisory procedure involving a matter to which we were a party. In any advisory procedure to which we were not a party but in which we had an interest, we would be notified by the Court and permitted to prove our interest. If our claim of interest were upheld we would become a party whose consent is necessary: if our interest were a known and apparent one, our claim of interest would be upheld as a matter of course, but if it were not, we would have to take our chance of proving it before the Court. If the Court should in such case decide that we had no interest or that it was of a frivolous or incidental nature, it could deny our claim of interest and then proceed to give its opinion in accordance with the request of the Council or Assembly.

Conclusion

To sum up: the fifth reservation lays an absolute prohibition on the Court when it receives a request for an advisory opinion; the Root formula provides a method for making known an interest claimed by the United States before the Court may entertain the request. The first is jurisdictional and statutory; the second is procedural and regulatory. The one refers to one time and place; the other to another time and place. They are therefore separate and independent in their scope, and together provide a complete operation. We should not mind how many requests are made, or by whom, or how, and the signatories in their reply to us have therefore indicated their own procedure for the exchange of views between us and the League bodies. If after that exchange of views we do not feel free to forego our ultimate

objection to the Court, we can prevent the request from being entertained by refusing our consent to the Court, until two-thirds of the signatories withdraw their acceptance of our reservations, or, by virtue of the Senate's fourth reservation, we may ourselves withdraw from the Court and restore the *status quo ante*. Thus the fifth reservation is not destroyed, impaired or modified, but is made workable.

Tabulation of Procedure. Finally, let us tabulate visually the procedure that would ensue under the protocol of accession:

1. The Secretary-General of the League notifies us that there is a dispute or question upon which the Council or Assembly proposes to ask the Court for an advisory opinion.

2. If desired, we designate a channel through which views are exchanged with the Council or Assembly. As a result, we may declare ourselves uninterested, or, if we declare ourselves interested, the proposal is

- a. Dropped,
 - b. Modified to everyone's satisfaction, or
 - c. Insisted upon.

3. If the proposal is insisted upon, we make it clear, having already declared our interest, that we are unwilling to forego our ultimate objection to the Court. The Council or Assembly then votes, and must thereupon declare itself competent to send the request to the Court upon a majority vote. Possibly the Court will refuse to recognize the validity of the request, but it may.

4. We can withdraw if we like. If we do not,

5. The Registrar of the Court notifies us that he has received the request, and gives us a reasonable time to comment upon it. If for any reason we have not previously exchanged views with the Council or Assembly, proceedings are stayed until we now do so, provided we inform the Court that we are interested.

6. We notify the Court that we do not consent to its entertaining the request.

7. The Court awaits developments. So do we, seeing no reason to withdraw.

8. The rest of the world feels strongly about the matter and wants the opinion. Two-thirds of the fifty-five Court members withdraw their acceptance of our reservations. We remain a member, but are now stripped of our reservations.

9. We withdraw from the Court.

10. The Council or Assembly repeats its request to the Court.

11. If we are a party to the dispute or question the Court is still powerless to act without our consent.

12. If we are not a party, we press before the Court our claim of interest which is already on file.

13. We argue our claim of interest before the Court, which finds,

- a. That we have an interest and grants our petition. We are now a party and can still bar the opinion by refusing our consent.
- b. That we have no such interest as we claim and denies our petition. It then renders the opinion.
- c. That we have an interest, but that it is so insubstantial that for the sake of the other interests involved the Court's duty is to give the opinion. It denies our petition and does so.

THE AUSTRO-GERMAN CUSTOMS UNION CASE ²⁷

On September 5, 1931, the Court rendered an advisory opinion which held that Austria was not free to enter into a proposed customs union with Germany contained in a protocol signed at Vienna on March 19, 1931. The case created considerable interest in this country among friends and enemies of the Court alike, and the typical reaction to the decision was that the customs pact was probably a good step in the direction of breaking down the artificial tariff barriers of the world and that Germany and Austria should have been allowed to have it if they wanted it.

The Court, however, was not asked to decide whether the customs union would be a good thing or whether it would be advantageous to the two nations involved or to the world at large. It was asked to decide whether Austria's undertakings in the customs union were compatible with certain other undertakings which she had previously assumed. In short, it had to interpret specific legal documents, not give its opinion of their wisdom.

The question asked of the Court by the Council of the League of Nations was:

"Would a regime established between Austria and Germany on the basis and within the limits of the principles laid down by the protocol of March 19, 1931, be compatible with Article 88 of the Treaty of Saint-Germain and with Protocol Number 1 signed at Geneva on October 4, 1922?"

Article 88 of the Treaty of Saint-Germain, which was the treaty of peace signed, with regard to Austria, in 1919, reads as follows:

"The independence of Austria is inalienable otherwise than with the consent of the Council of the League of Nations. Consequently, Austria undertakes in the absence of the consent of the said Council to abstain from any act which might directly or indirectly or by any means whatever compromise her independence, particularly, and until her admission to membership of the League of Nations, by participation in the affairs of another Power."

²⁷ PERMANENT COURT OF INTERNATIONAL JUSTICE, Series A/B No. 41.

In Protocol Number 1 signed at Geneva on October 4, 1922, Austria

"Undertakes, in accordance with the terms of Article 88 of the Treaty of Saint-Germain, not to alienate its independence; it will abstain from any negotiations or from any economic or financial engagement calculated directly or indirectly to compromise this independence.

"This undertaking shall not prevent Austria from maintaining, subject to the provisions of the Treaty of Saint-Germain, her freedom in the matter of customs tariffs and commercial or financial agreements, and in general, in all matters relating to her economic regime or her commercial relations, provided always that she shall not violate her economic independence by granting to any State a special regime or exclusive advantages calculated to threaten this independence."

The majority opinion, written by the French judge, holds that the Vienna Protocol of 1931 was incompatible with the First Geneva Protocol of 1922. Six of the majority felt that it was also incompatible with Article 88 of the peace treaty. Judge Anzilotti, the Italian judge, agreed in a separate opinion with these six but reached his conclusion by different reasoning. The minority opinion found no incompatibility. The majority included the French, Polish, Italian, Spanish, Roumanian, Cuban, Salvadorean and Colombian judges. The minority included the American, English, Chinese, Japanese, German, Belgian and Dutch judges.

The question presented to the Court divides itself into two parts: *first*, the question of law, as to whether the Vienna Protocol was in itself an alienation of Austria's independence; *second*, the question of fact, as to whether the protocol would have the effect of threatening Austria's independence, so far as could reasonably be foreseen.

All three opinions agreed that by signing the customs pact Austria would not alienate her *political* independence. They disagreed as to whether or not the consequences of the pact, so far as could reasonably be foreseen, would be such as to threaten Austria's *economic* independence.

At the argument, two very important facts were admitted. First, that Austria is politically and economically weaker than Germany. Second, that the reasons for Austria's signing the documents of 1919 and 1922 were her political and economic exhaustion following the war, her financial reconstruction by the League in 1922, and the Allies' desire that there be no *rapprochement* between Germany and Austria but that they remain separate and apart from each other. These facts were put in evidence by the parties themselves, not by the Court or by the League, as is shown by the following excerpt from Judge Anzilotti's opinion in support of the majority:

"In the first place, account must be taken of the movement already in existence in Germany and Austria, the aim of which is to effect the political union of the two countries. Here we are confronted with a well-known fact and one therefore which the Court could take into consideration even if it had not been advanced by the interested Parties. *This fact was, however, invoked on several occasions, and I do not think it was contested.* Moreover,

it is at the root of Article 80 of the Treaty of Versailles and Article 88 of the Treaty of Saint-Germain; indeed these articles were only adopted to check the movement towards the union of Germany and Austria, a movement which showed signs of very rapid development after the War.

"This movement, which is based upon community of race, language and culture, and thus upon a very strong sentiment of common nationality, is further strongly encouraged by the difficult situation in which Austria was placed by the treaties of peace and which impelled her to seek the possibility of existence and development in union with other countries. *Here again we are dealing with facts well known to all and established in the present proceedings.*"²⁸

"It is in the light of these facts that we must ask what reasonably probable effects the Customs Union would have upon Austria's independence."

In the light of these facts and of Austria's specific engagement not to "compromise" or "threaten" her independence "directly or indirectly or by any means whatever" particularly "by participation in the affairs of another Power" or by "granting to any State a special regime or exclusive advantages", let us examine the provisions of the proposed customs pact.

To the extent that it abolishes all export and import duties between the two countries it is admittedly a special regime of reciprocally exclusive character. Each of them must put an agreed tariff into effect in its own territory by its own legislative and executive machinery, but they shall act concurrently in doing so and no amendments can be made to the tariff without mutual consent. Internal customs duties, and their rates, duration and categories, the turn-over tax and the exchange of goods covered by monopolies or excise duties in either country are subject to joint agreement. The duties received do not belong to the collecting State but are apportioned according to an agreed quota.

When dealing with outside nations, Article IX provides as follows:

"(1) Each of the two Governments, even after the entry into operation of the treaty, shall retain *in principle*²⁹ the right to conclude commercial treaties with third States on their own behalf.

"(2) In the relevant negotiations with third States, the German and the Austrian Governments will see that the interests of the other contracting Party are not violated in contravention of the tenor and purpose of the treaty to be concluded.

"(3) So far as it seems opportune and possible with a view to effecting a simple, speedy and uniform settlement of the commercial relations with third States, the German Government and the Austrian Government *will conduct joint negotiations*³⁰ for the conclusion of commercial treaties with third States. Even in this case, however, Germany and Austria will each on its own behalf, sign and ratify a separate commercial treaty and will only arrange for a simultaneous exchange of the ratifications with the third State in question."

²⁸ Italics the present writer's.

²⁹ *Ibid.*

³⁰ *Ibid.*

It does not require unusual intuition to perceive that while the language is carefully chosen to give the appearance of perfect freedom to each party, the real effect of it is to provide that Germany and Austria shall henceforth act together commercially.

The union then provides for an Arbitral Committee in the following words:

"(1) To ensure a smooth working of the treaty, an Arbitral Committee composed of members of the two Parties on the lines of complete parity shall be provided for. This Committee will have to deal with the following matters:

- "(a) settlement by arbitration of differences of opinion arising between the two Parties as to the interpretation and application of the treaty;
- "(b) *to bring about a compromise in cases where the treaty provides for a special agreement between the two Parties or in which, according to the tenor of the treaty, the realization of the intentions of the one Party depends upon the consent of the other, provided that in such cases agreement cannot be reached between the two Parties.*"³¹

With the above outline of the Vienna Protocol in mind, could it not reasonably be foreseen that where one of the parties to it is weaker than the other—as was admitted—the weaker would tend to come under the domination of the stronger and to that extent have its independence threatened? What is meant by "independence"?

The minority opinion defines it in these words:

"A state would not be independent in the legal sense if it was placed in a condition of dependence on another power—if it ceased itself to exercise within its own territory the *summa potestas* or sovereignty, i. e., if it lost the right to exercise its own judgment in coming to the decisions which the Government of its territory entails. Restrictions on its liberty of action which a state may agree to do not affect its independence, provided that the state does not thereby deprive itself of its organic powers."

It is suggested that this definition is too narrow, for it ignores the element of freedom over foreign policy, and limits independence to the possession by a nation of powers as a political organism. Independence means more than control over its own territory and the inhabitants of it. Lord Birkenhead, in his work on International Law, gives the following definition:³²

"An independent State is entitled to live its own life in its own way, the sole judge within the law of its domestic government and its foreign policy."

Hall, another eminent English authority,³³ says:

³¹ *Ibid.*

³² SMITH, INTERNATIONAL LAW (6th ed. 1927) 76.

³³ HALL, INTERNATIONAL LAW (8th ed. 1927) 55.

"Independence is the power of giving effect to the decisions of a will which is free, in so far as absence of restraint by other persons is concerned. The right of independence, therefore, in its largest extent, is a right possessed by a state to exercise its will without interference on the part of foreign states in all matters and upon all occasions with reference to which it acts as an independent community."

The majority opinion declares that the independence of Austria means "the continued existence of Austria within her present frontiers as a separate State, with *sole right of decision* in all matters economic, political, financial, or other." The difference between the majority and the minority would therefore seem to turn upon the point of whether or not Austria's independence meant the retention only of her organic powers or of her freedom of action as a member of the family of nations in addition. Certainly Austria agreed in the treaties of 1919 and 1922 not to restrict her freedom of action "by participation in the affairs of another power" or "by granting to any State a special regime or exclusive advantages," without the consent of the Council of the League of Nations. Otherwise, as a sovereign power, she could have done any of these things, even to the point of compromising or imperilling her independence.

It seems absurd to criticise the Court for taking into account the probable effect of the customs union on the ground that to do so is to exercise a function that is not judicial. Bearing in mind always the facts admitted by the parties, it is not difficult to agree with Judge Anzilotti that "in view of the great disproportion of the economic strengths of Germany and Austria, it must be regarded as reasonably probable that Austria's economic life would sooner or later become dependent upon Germany's." One might as justly criticise a court for considering, as an element in making its decision, the probable effect upon the health of *A's* family of a factory built by *B* on property adjoining *A's* residence in a suit to restrain the erection of the factory as a nuisance. Nor can the Court reasonably be criticised for considering the history and reasons underlying the treaties of 1919 and 1922. Hardly a volume of law reports in this country can be consulted without finding a case in which the court explains the reasons for particular legislation—the good it was intended to establish or the evil it was hoped to prevent, as throwing light upon the meaning of language requiring interpretation.

Other criticisms leveled at this decision of the Court are almost too frivolous to mention. It is asserted that the Court divided along Nordic-Latin lines, but to sustain this contention it is necessary to class the Polish judge as a Latin and the Belgian, Chinese and Japanese judges as Nordics. It is asserted that the Court divided along lines of national or political interest. If this is so, why do we find Belgium voting with Germany against France, Spain and Italy voting with France, and the English judge voting against the political position of his own country? What possible interest

have China and Japan in putting Germany and Austria together, or Cuba, Salvador and Colombia in keeping them apart?

The writer appeals to those who are inclined to criticise the Court in this way to examine with at least ordinary care the decision and the documents before the Court. Then let them criticise, if they will, the validity of the reasons given in the opinions as they would criticise the *ratio decidendi* of an American Court in any given case. This is a different thing from branding the majority judges as being tainted with political influences from which the minority were miraculously delivered, and accusing them of having invoked, like the Witch of Endor, the ghost of a juridical Samuel. They were not asked to find what may be the opinion of the world today with regard to Germany and Austria becoming economic partners and to permit them to do so should the finding be favorable. They were asked to interpret two treaties signed a decade ago under admitted conditions and for reasons whose wisdom was not in question. One may disagree with their law or their reasoning or their method, but even a superficial review of the case must reveal that they listened like judges, deliberated like judges and differed like judges upon the record before them.

It is difficult to understand by what reasoning, as distinguished from emotionalizing, the United States has continued thus long to abstain from membership in a body which exists upon principles for which this country has stood for nearly a century—the peaceful settlement of international disputes. Our interests are safeguarded under our five reservations and the provisions of the Root Formula enabling them to be made effective. It is a Court to which we may have recourse when we want it, but one to which we cannot be summoned. We may even prevent its considering cases to which we are not a party, but in which we believe our interests might be affected. It is hard to conceive more adequate protection.

Chief Justice Hughes, who sat for a short time on the bench of the World Court, has said of it,

“There will be no world court if this Court cannot be made one, and whether or not it is to be in the fullest sense a world court depends upon our own action.”